

1. **Chen (Migration) [2017] AATA 1648 (4 September 2017)**

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Ms Rongjun Chen
Mr Lei Luo
Mr Yilin Chen
Ms Yingtong Luo

CASE NUMBER: 1614819

DIBP REFERENCE(S): BCC2015/2319830 BCC2015/2320078
BCC2016/3651138

MEMBER: Stavros Georgiadis

DATE: 4 September 2017

PLACE OF DECISION: Adelaide

DECISION: The Tribunal remits the applications for Business Skills (Residence) (Class DF) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 892 (State/Territory Sponsored Business Owner) visas:

- Public Interest Criterion 4020 for the purposes of cl.892.223 of Schedule 2 to the Regulations.

5.

Statement made on 04 September 2017 at 5:41pm

CATCHWORDS

Migration – Business Skills (Residence) (Class DF) visa – Subclass 892 (State/Territory Sponsored Business Owner) – Public Interest Criterion 4020 – Providing bogus documents – Migration agent's unauthorised provision of altered documents – Compassionate or compelling circumstances for waiver –Applicant's cooperation with the Department – Detrimental impact on several Australian businesses – Loss of spouse's investments

LEGISLATION

6. *Migration Act 1958*, ss 5(1), 65

Migration Regulation 1994, r 1.03, Schedule 2, cl 892.223, Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

7. This is an application for review of a decision made by a delegate of the Minister for Immigration on 12 September 2016 to refuse to grant the applicants Business Skills (Residence) (Class DF) subclass 892 visas under s.65 of the *Migration Act 1958* (the Act).
8. The applicants applied for the visas on 11 August 2015. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.892.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found that the applicant has given, or caused to be given, a bogus document and information that is false and misleading in a material particular in breach of PIC 4020(1) and that there were no compelling circumstances or compassionate or compelling circumstances to waive this requirement.
9. The first named applicant (the applicant) appeared before the Tribunal on 4 September 2017 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Wayne Chao, a Director of the applicant's business, Bamboo Studio Pty Ltd (t/as IAGE Media). The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
10. The applicants were represented in relation to the review by their registered migration agent.
11. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.892.223 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).

13. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

14. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
15. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
16. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
17. The applicant's oral evidence before the Tribunal was that at the time of application she was unaware that any altered documents had been provided to the Department as part of the visa application. She explained to the Tribunal that altered documents in the nature of a screen shot of her website as well as a number of invoices relating to her business had been modified by her previous migration agent in a manner that was unauthorised by her and submitted as part of the visa application.
18. In respect of documents the Tribunal notes the letter of 7 April 2016 sent to the applicants inviting comment on the information set out in that letter. This includes the false documents as follows:
- colour copy of the applicant's nominated businesses website page located at *iage.com.au/portfolio.html* printed on 5 August 2015;
 - colour copy of a tax invoice issued by Puratap dated 11 June 2005 with invoice number 4399013;
 - colour copy of tax invoices issued by Fuji Xerox dated 31 August 2013, 31 May 2014, 31 December 2014, 31 January 2015 and 31 March 2015.
19. The applicant's evidence is that these 'altered documents' were provided by a staff member of her previous migration agent without her authority. The applicant confirmed in her oral evidence that at the time of application the altered documents had been unwittingly provided as part of the visa application. This was also confirmed in oral evidence by the business's other Director, Mr Wayne Chao, at the hearing. Mr Chao and the applicant were both Directors of the business at the time of visa application, and presently. Mr Chao has

reduced his time in the business as he has established a separate wine bottling business in South Australia. Ms Chen remains as full-time Director of the business.

20. When questioned further at the hearing about the reason why the false documents were provided, the business's Directors were of the view that the previous migration agent attempted to add the visa applicant's name to various documents (or overwrite the business name on various documents) with the aim of establishing a connection between the visa applicant and the business. However, the Tribunal considers that it was readily ascertainable at the time that the visa applicant was a Director of the business and therefore, the alterations did not necessarily create a misleading impression of the visa applicant's involvement in the management of the business. Although the Tribunal raised concerns at the hearing as to whether the above documents in fact provide misleading information in a material particular, it nevertheless accepts that bogus documents (as defined) have been provided in respect of the application.
21. The Tribunal accepts that the amended documents were provided in the manner described above and that the applicant was unaware that the documents had been provided in amended format to the original documents. However, as mentioned at paragraph 9 above, the requirement in cl.4020(1) not to provide a bogus document applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
22. The Tribunal finds there is evidence before it that the applicant has given, or caused to be given, to the Minister a 'bogus document', as defined in s.5(1), i.e. a document that the Tribunal reasonably suspects is a document that is counterfeit or has been altered by a person who does not have authority to do so, in relation to the visa application or a visa held in the 12 months before the visa application was made.
23. Therefore, the applicant does not meet cl.4020(1).

SHOULD THE REQUIREMENTS OF CL.4020(1) OR (2) BE WAIVED?

24. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
25. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes, but the Tribunal has had regard to the PAM3 policy guidelines in respect of this. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
26. For the following reasons, the Tribunal is satisfied that the requirements should be waived in the particular circumstances of this case.
27. The Tribunal has had regard to the nature of the documents that were amended by the previous migration agent and considers that in most instances the name of one Director was replaced for the name of another Director or the name of the business company and is not of any material misrepresentation. The Tribunal is satisfied from the oral evidence provided at the hearing that Mr Chao has reduced his time at the business because of his wine bottling company and that the applicant remains full time Director and actively involved in the management of the business which has 4 employees. The Tribunal accepts that the business has an association with the various brands named on the business website and

that the invoices from suppliers or service providers were in fact from those who already had an association with the business.

28. The Tribunal also gives weight to the circumstances that the three altered documents were provided by the applicant's former migration agent without the applicant's knowledge and accepts her oral evidence at the hearing which was given in a straightforward and spontaneous manner. There were no attempts to evade questions and the applicant provided fulsome and complete responses. For these reasons, the Tribunal considers that the applicant is a witness of truth and has provided reliable evidence to the Tribunal.
29. The Tribunal accepts the submission that the applicant could not reasonably foresee that the documents provided by her former migration agent would be in a 'doctored manner' as she had not instructed or authorised any such documents to be provided. In any case, the Tribunal considers these amendments did not add any substantial weight to the merits of the application. The Tribunal further gives weight to the circumstances where Ms Chen notified the Department of the altered documents as soon as practicable once the Department had asked her to comment on this in the letter of 7 April 2016, noting the response was provided before the due to time for response of 5 May 2016. The Tribunal considers that in this regard the applicants have continued to co-operate and assist the Department and the Tribunal.
30. The Tribunal has also given consideration to the fact that the business employs four employees in addition to the two Directors who remain in an active role in the business. One of the Directors, Mr Wayne Chao is and Australian citizen. The employees engaged in the business include an Australian citizen and an Australian permanent resident. The Tribunal accepts the oral evidence that should the visa applications not be successful then this would adversely impact on the business as Ms Chen is the Editor in Chief of the publishing business which produces a weekly newspaper for the Chinese community in South Australia and has a readership in the order of 50,000 members. At the hearing the applicant brought a number of published newspapers and the Tribunal accepts that it is clearly evident that the business is actively publishing in the specialist area of Chinese community interests in South Australia. Furthermore, the Tribunal accepts the oral evidence that other Australian businesses and persons would be adversely affected as the business prints its newspapers in Victoria (undertaken by ACM printing) on a weekly basis and its employees there would suffer detriment from losing a major client for whom printing is presently being undertaken on a regular basis.
31. Tribunal has also given weight to the submission and evidence that the applicant has two children who are still undertaking their education in South Australia. This includes her son who is undertaking a Master's degree in International Trade at the University of Adelaide having completed a Bachelor qualification in Information Technology also at the University of Adelaide. The Tribunal gives weight to the evidence that the applicant has a 13-year-old daughter who is in year seven attending a Private College in South Australia and is still in the formative years of her formal education here.
32. The Tribunal also has given consideration to the circumstances where the primary applicant's husband Mr Lei Luo, is Chief Executive Officer of Starlight Culture Entertainment Group Limited which is involved in the film /entertainment business in Australia. The oral evidence is that he is presently residing in Los Angeles as he has strong connections with film producers in Hollywood and commutes to Australia regularly. He is presently in the process of undertaking the production of a feature film to be filmed on location in South Australia, Victoria and Western Australia. There is also a substantial post-production component be undertaken in Australia. When the Tribunal explored this further in respect of the economic and cultural benefits it would provide to the Australian community, the evidence before the Tribunal was that four drafts of the film script have already been

undertaken and the interested parties are set to commence shooting on location once the visa applications are successful. Mr Lei Luo is also a visa applicant in this combined application and remains on a bridging visa pending the outcome of the present application.

33. The Tribunal accepts the oral evidence provided that the business of which the visa applicant's husband is Chief Executive Officer has invested in excess of \$1 million in preparation of the script and exploring filming venues in Victoria, South Australia and Western Australia.
34. Having regard to all the circumstances above the Tribunal accepts that there are compelling circumstances that affect the interests of Australia, and compassionate or compelling circumstances that affect the interests of an Australian citizen or Australian permanent resident that justify the granting of the visa.
35. Therefore the requirements of cl.4020(1) should be waived.

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

36. Clause 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The Tribunal is satisfied from the documents on file, including document relating to the applicant's nationality and identity, that the applicant is the person she states she is - and the Tribunal is therefore, satisfied as to her identity.
37. Therefore the applicant meets cl.4020(2A).

38. Has a visa applicant satisfied cl.4020(1) during the period starting 3 years before the application; visa previously been refused on the basis of a failure to satisfy cl.4020(2A)?

39. There is no evidence that the applicant and each member of the family unit has been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused.
40. Clause 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. There is no evidence of this before the Tribunal. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2BA).
41. Therefore cl.4020(2B) does not apply and is otherwise satisfied.
42. On the basis of the above, the first named applicant does satisfy PIC 4020 for the purposes of cl.892.223 for the grant of the visa.

DECISION

43. The Tribunal remits the applications for Business Skills (Residence) (Class DF) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 892 (State/Territory Sponsored Business Owner) visas:
 - Public Interest Criterion 4020 for the purposes of cl.892.223 of Schedule 2 to the Regulations.

Stavros Georgiadis
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...